

United States Court of Appeals
For the Ninth Circuit

ALASKA STEAMSHIP COMPANY, *et al.*, Petitioners,
vs.

FEDERAL MARITIME COMMISSION and UNITED STATES
OF AMERICA, Respondents.

PETITION FOR REVIEW OF ORDER OF FEDERAL MARITIME
COMMISSION

REPLY BRIEF OF PETITIONERS

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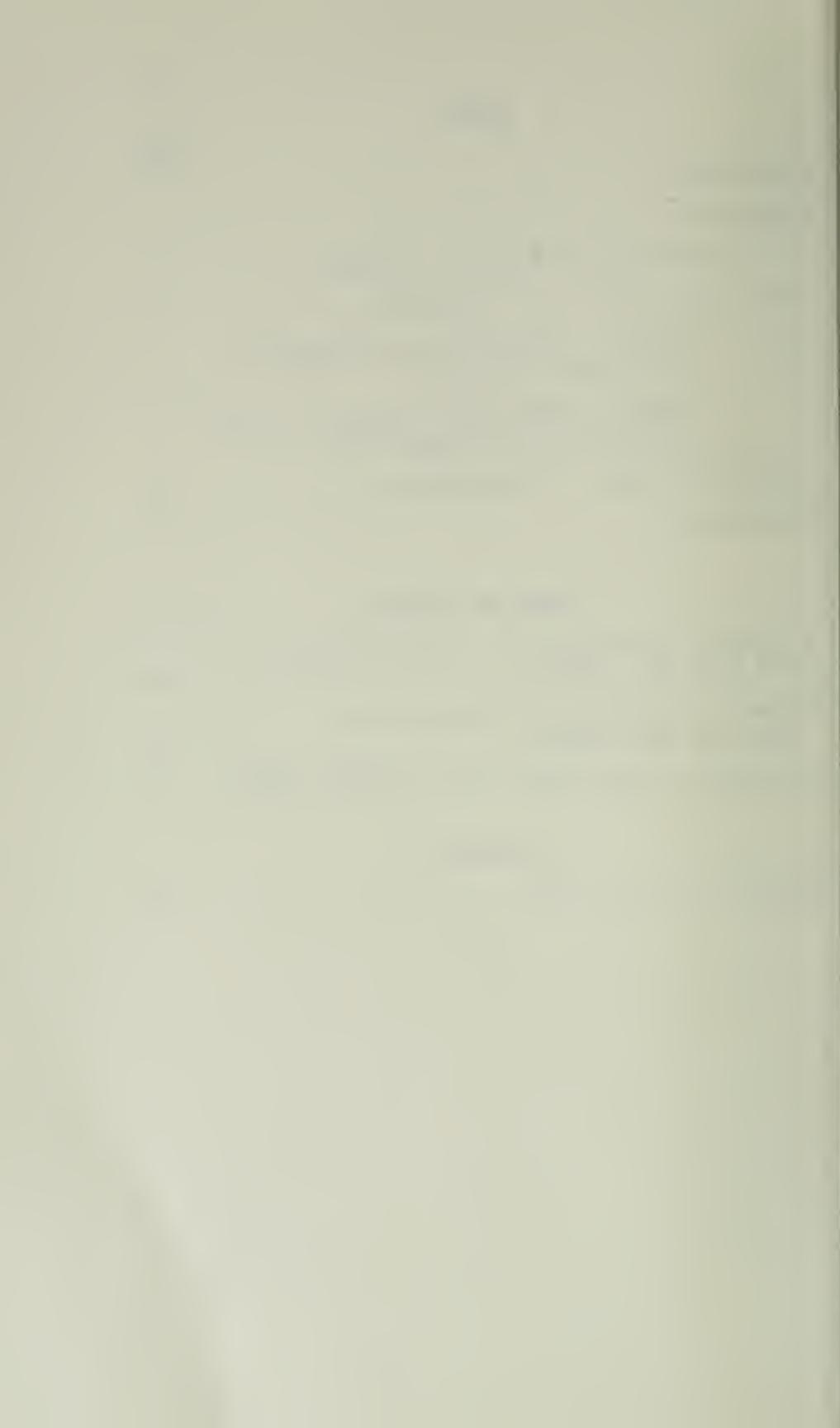
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STATEMENT

This is a reply to the Brief of Respondents.

ARGUMENT

I. The Renewed Motion to Reopen

Respondents do not attempt to justify the failure of the Commission to grant Alaska Steam a hearing on the renewed motion to reopen.

Alaska Steam asserts that the denial by the Commission of the renewed motion to reopen, thereby failing to comply with this Court's decision and decree in the prior review proceedings, is arbitrary and capricious and an abuse of discretion. This Court's decision and decree in the prior review proceedings are final and conclusive and no longer subject to reargument by way of amplification or otherwise.

This Court in its decision discussed the various considerations then urged by the Commission in support of its denial of Alaska Steam's motion to reopen and stated that it "need not decide whether there was an abuse of discretion in denying the motion to reopen" because Alaska Steam "should be permitted to renew that motion in the light of circumstances as they now exist." (R. 208.) This Court further stated that it was not thereby indicating "that it would necessarily be an abuse of discretion for the Commission not to reopen the investigation" inasmuch as there "*may be considerations not drawn to our attention which would warrant such a denial.*" (Emphasis supplied.) (R. 209.)

Alaska Steam filed a renewed motion to reopen and both Alaska Steam and the Commission's Hearing Counsel understood this Court to mean that if there were no such considerations, the Commission was to grant the renewed motion to reopen. The Commission apparently likewise so construed this Court's decision. The Commission referred to the above quoted language of this Court and stated in support of its denial of the renewed motion to reopen "that an amplification of the reasons advanced to the Court of Appeals in support of the argument that denial of Alaska Steam's previous petition to reopen was not an abuse of discretion *coupled with considerations not drawn to the Court's attention warrant the denial.*" (Emphasis supplied.) (R. 209.) The Commission's Hearing Counsel was of a contrary view. (Br. of Pet. p. 6.)

Petitioners in their opening brief have documented that all of the reasons and considerations asserted by

the Commission in its August 19, 1965 Order in support of its denial of the renewed motion to reopen were in fact considerations which had been drawn to this Court's attention in the prior review proceedings. The respondents make no contention to the contrary.

In the March 5, 1964 Order considered in the prior review proceedings the Commission affirmed the Examiner's finding that the 1962 test year was "a representational year" (R. 111). The Commission further found that the "record does not contain adequate information on seasonal operations over a 3-4 year period" to support the use of a 3-4 year red salmon run cycle as the test period (R. 111). Despite this, respondents make an argument based on alleged "four-year cycles" in the seasonal service which has no basis in any finding made by the Commission. Without findings of the Commission in support thereof, the respondents, in the prior review proceedings, stated that the 1962 test year "approximated the results of what would be an average year in the corporate life of Alaska Steam." (R. 229.) In the August 19, 1965 Order the Commission states that "We adhere to that statement made to the Court of Appeals." (R. 229.) Respondents assert that the Commission thereby sought to respond to this Court's statement that "with the passage of each year, the 1962 test year becomes more and more vulnerable to the charge of staleness." (Br. for Resp. p. 3.) The significance of this argument by respondents is not apparent, but it is apparent that nothing new has been added to the reasons and considerations urged upon this Court in the prior review proceedings.

II. The Income Tax Calculation

Respondents are in error in asserting that the correction of the income tax allocation was the primary reason for this Court remanding the proceedings to the Commission. It was, however, an important reason and has alone resulted in a correction of major importance, namely, a corrected finding that the rate of return in the seasonal service at the Company rates based on the test period was 13.97% rather than 19.75%.

A. Error in Allocation of Administrative and General Expense

In the prior review proceedings Alaska Steam sought approval for the allocation of administrative and general expense on the basis of actual vessel days in accordance with a General Order of the Maritime Administration rather than on the formula adopted by the Commission, namely, the proportion that the total vessel operating expense of each service bears to the total vessel operating expense. This Court approved the Commission's choice of formula stating that it "does not represent arbitrary action." (R. 199.)

The Commission's formula having been thus approved should have been used by the Commission in its August 19, 1965 Order in allocating administrative and general expense for the purpose of determining the gross and net income of the seasonal service. The Commission, however, did not do so but on the contrary used the rejected Alaska Steam's formula for the purpose of allocating this expense to the charter operation of the vessel TALKEETNA and then proceeded to use the Commission's formula approved by this Court in allocating

the remainder of this expense between the seasonal and scheduled services. Contrary to respondents' contention this error affects both the determination of gross profit and the determination of income tax liability for the purpose of arriving at net profit in the seasonal service. It erroneously increases the loss incurred in the charter operation by \$21,361 and erroneously increases the gross profit of the seasonal service by \$5,054. (Br. of Pet., App. Sch. 1.) This further results in an erroneous determination of the rate of return in the seasonal service at the Company rates based on the test period. (Br. of Pet., App. Sch. 2.)

Respondents further assert that the Commission has no jurisdiction over the charter operation. This, of course, has no bearing on the Commission's obligation to make a proper allocation of the administrative and general expense. If, as the Commission states, it has no jurisdiction over the charter operation, the results of that operation should not be included in making the income tax calculation. If not included the rate of return in the seasonal service at the company rates based on the test period would be something less than 12.85%.¹

B. Error in Deduction of Interest in Determining Federal Income Tax

In Exhibit 3-B-5, sheet 2, Alaska Steam deducted an interest item of \$13,015 in determining the gross profit of the over-all Alaska operation. It was only for this reason that this item entered into Alaska Steam's determination of federal income tax in this exhibit. The

¹Application of the calculation in Brief of Petitioners, App. Sch. 2, Col. B, omitting "Other" and increasing "Total" to \$412,519.

Commission can scarcely properly rely upon this as a basis for asserting that Alaska Steam, having deducted the item for income tax purposes, the Commission should also do so.

III. The Issue of Confiscation

The constitutional principle announced in *Baltimore & O. R. Co. v. United States*, 298 U.S. 349 (1936) applies equally to both divisions and rates prescribed by a regulatory agency. This is clearly recognized in the earlier cases cited in that decision and in the later cases of *New York v. United States*, 331 U.S. 284 (1947) and *American Trucking Assos. v. United States*, 344 U.S. 298 (1953) on which petitioners rely. It is no defense to the claim of constitutional confiscation here asserted to state that Alaska Steam may file increased tariffs on thirty days notice following compliance with the Commission's order requiring the filing of decreased rates. If Alaska Steam after filing decreased rates, files increased rates such rates will be subject to suspension under its statutory authority to do so. (Br. of Pet., pp. 11, 12, Title 46 U.S.C.A. §845.) Within the four-month statutory period of suspension the Commission may, after hearing, permanently suspend the increased rates, leaving Alaska Steam to its remedy by review. Until eventual relief is obtained by review proceedings the confiscatory decreased rates will remain in effect.

The fact of confiscation, not the period during which it will continue to exist, would appear to be the circumstance entitling Alaska Steam to seek judicial protection. It is believed that Alaska Steam has established

its right to have the issue of confiscation determined by this Court.

CONCLUSION

The prayer of the petition for review should be granted.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney

